

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2009 Session

IN RE D.S.P.

**Appeal from the Juvenile Court for Wayne County
No. 8885 James Y. Ross, Judge**

No. M2008-01690-COA-R3-JV - Filed May 21, 2009

On father's petition to modify custody order, the trial court found a material change in circumstances and that a change in custody from mother to father was in the best interest of the child. Mother appeals, asserting that a change of custody was not in the best interest of the child. Finding that the trial court did not abuse its discretion, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Mark K. Green, Columbia, Tennessee, for the appellant, Rachel M.

William M. Harris, Lawrenceburg, Tennessee, for the appellee, Anthony P.

MEMORANDUM OPINION¹

I. Factual and Procedural History

On February 26, 2003, a child was born out-of-wedlock to Rachel M. ("Mother") and Anthony P. ("Father"); Father's acknowledgment of his paternity of the child was memorialized in an order of the Wayne County Juvenile Court entered on January 29, 2004. A parenting plan was

¹ Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

adopted on February 26, 2004, which established Mother as primary residential parent; Father was accorded parenting time from Friday night until Sunday night on alternate weekends.²

On January 29, 2008, Father filed a Petition for Contempt and Modification of Child Visitation (“Petition”). On March 25, Father filed a Petition for Emergency Temporary Custody of the child, alleging that she was dependent and neglected and, on that day, the trial court entered an Ex Parte Temporary Custody Order, placing the child in Father’s custody pending a hearing. On April 4, the parties entered an Agreed Order, which left custody of the child with Father until a hearing on the Petition, provided Mother with visitation rights, and prohibited contact between the child and Mother’s husband. On May 5, Mother filed an Answer to the Petition.

A hearing was held on June 6, 2008, and the trial court entered an order on June 25, finding, *inter alia*, that a material change of circumstances had occurred and establishing Father as the primary residential parent. Mother appeals the trial court’s determination that changing primary residential parenting from Mother to Father was in the best interest of the child; she does not appeal the trial court’s finding that there was a material change in circumstance.

II. Analysis

The residential schedule in a permanent parenting plan may be modified in certain situations. A decision on a request for modification of a parenting arrangement requires a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). A party petitioning to change an existing custody order must prove both (1) that a material change of circumstances has occurred and (2) that a change of custody or residential schedule is in the child’s best interest. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 575 (Tenn. 2002). Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002); *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006). Mother concedes that a material change of circumstances has occurred; consequently, we need only review whether the trial court’s action was in the best interest of the child. *Cranston*, 106 S.W.3d at 644. The determination of the best interest of the child requires consideration of a number of factors, including those set out in Tenn. Code Ann. § 36-6-106(a).

The trial court has discretion in determining custody and visitation between parents and minor children, and the decision of the trial court will not ordinarily be reversed absent some abuse of that discretion. *See Bueno v. Todd*, No. W2005-02164-COA-R3-CV, 2006 WL 2106006, at *5 (Tenn. Ct. App. July 31, 2006). The Tennessee Supreme Court addressed the abuse of discretion standard in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) stating that:

² The Parenting Plan was reviewed by the trial court on May 27, 2004, and was re-adopted with an amendment that the child support be paid directly to the Central Child Support Receiving Unit. The trial court also set an amount of \$520.00 as retroactive child support owed to Mother, which was to be repaid at \$5.00 per week, plus interest.

Under the abuse of discretion standard, a trial court's ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (internal citations omitted). Our review of the trial court’s findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. See Tenn. R. App. P. 13(d); *Kaplan v. Bugalla*, 199 S.W.2d 632, 635 (Tenn. 2006). In addition, the factual findings of the trial judge are entitled to great weight where the trial judge saw and heard the witnesses, observed their manner and demeanor on the stand and was therefore in a much better position than the appellate court to judge the weight and value of their testimony. See *Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984).

In the Petition, Father alleged that, since July 29, 2007, Mother had: (1) failed to deliver the child to Father according to the visitation order; (2) refused to allow Father his right to unimpeded telephone conversations with the child; (3) refused to inform Father of the child’s extracurricular activities, medical information or any other information concerning the child; (4) made derogatory remarks about Father in front of the child; and (5) claimed the child as a dependent for tax purposes every year while, under the parenting plan, the parties were to alternate the tax deduction.

At the conclusion of the hearing, at which Father, Mother, Father’s wife (“Stepmother”), Mother’s husband (“Stepfather”), Mother’s mother (“Grandmother”), a Department of Children’s Services investigator, and the child testified, the trial court made a number of findings.

The trial court first found that Mother prevented Father from exercising his visitation rights with the child. The testimony revealed that Mother failed to appear at the court-ordered location where Father was to pick up the child, that Mother and Grandmother had changed the court ordered location without approval of the court, and that, while the child was in Father’s custody, Mother unreasonably prevented Stepmother from picking up the child after Mother’s visitation because Father was not with Stepmother. The trial court found that it was in the best interest of the child for the parties to “get along” and that Mother had “lost sight of that” for these reasons. The trial court also found that Mother did not put forth a sufficient effort to communicate with Father in order to facilitate his visitation with the child and to keep him informed of the child’s “extra curricular activities, when the child is sick, when the child is injured, what the child’s grades are; when the child is missing school,” pursuant to her obligations as primary residential parent under Tenn. Code Ann. § 36-6-101.³

³ At trial, the court referred to Mother’s obligations as primary residential parent as being found at Tenn. Code Ann. § 36-1-110, however, the correct statute is Tenn. Code Ann. § 36-6-101, which the court properly cited in its order.

The trial court also found that a letter sent to Father from Mother's attorney, requesting that he terminate his parental rights to the child, was "indicative of what I believe to be is, and has been, an ongoing, intentional custodial interference situation by the mother against the father." Father testified that Mother's attorney sent him a letter which asked him to terminate his parental rights to the child so Stepfather could adopt her. The court found this letter to violate public policy against one parent terminating the rights of the other.

The trial court's next finding was that Mother and Stepfather had attempted to influence the child's testimony through bribery and "coaching." Mother's testimony revealed that she and Stepfather bought a pony for the child as a birthday gift; the testimony also revealed that the pony was purchased two months after the child's birthday, after the Petition was filed, and before the hearing date. The testimony of the child and of Susan Franks, an investigator with the Tennessee Department of Children's Services, both revealed that Mother and Stepfather were encouraging the child to tell the court that Mother and Stepfather bought her a pony; that she loved Mother and Stepfather, but not Father and Stepmother; and that Father and Stepmother had touched the child.

Lastly, the trial court found that Father was more likely to "foster a relationship between [the child] and the mother." The testimony revealed that, while the child was in his custody, Father provided Mother with visitation when he was under no obligation to do so; that he did not restrict communication between the child and Mother; and that Mother admitted on cross examination that Father allowed her to have visitation every week with the child even though it was not required by the Agreed Order.

It is clear from the trial court's statements that a best interest analysis utilizing the factors at Tenn. Code Ann. § 36-6-106 was done and that the analysis primarily focused on the statutory factor relating to "[e]ach parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child." Tenn. Code Ann. 36-6-106(a)(10).

The trial court found that Mother had not fulfilled her obligations as primary residential parent by failing to follow the trial court's visitation orders, by failing to communicate with Father, by attempting to interfere with Father's custodial rights, and by attempting to bribe and influence the child. The trial court also found that, while the child was in his custody, Father had shown potential for successfully performing the obligations of the primary residential parent by voluntarily ensuring that the child was permitted to communicate and visit with her Mother; as a result, the trial court found that, of the two parents, Father is more likely to foster a relationship between the child and Mother than Mother would foster a relationship with Father.⁴ Lastly, while analyzing the evidence

⁴ In her brief on appeal, Mother admits that she did not foster the relationship between the child and Father when she states that "this is a case where the proof simply does not show that the changes of circumstances, even conceding the fact that the mother alienated the daughter from the father...is in the best interest of the child."

in light of the statutory factors, the trial court weighed the credibility of each party and found Father to be more credible.

As stated earlier, this Court's review on appeal requires a consideration of the evidence *de novo*, with a presumption of correctness to the trial court's findings, Tenn. R. Civ. P. 13(d), and, since the evidence to be considered on appeal is mainly testimonial, those findings are afforded great weight. *Duncan*, 686 S.W.2d at 571. Upon review of the record, we do not find that the evidence preponderates against the trial court's findings that Father would best perform the parenting responsibilities and that changing custody from Mother to Father was in the best interest of the child; consequently, the trial court did not abuse its discretion.

IV. Conclusion

For the reasons set forth above, the decision of the Juvenile Court is AFFIRMED. Costs are assessed against Mother, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE